# In the
# preme Court of the United States

October Term, 1971

No. 71-738

MESCALERO APACHE TRIBE,

*Petitioner,*

*vs.*

KLIN JONES, COMMISSIONER OF THE
AU OF REVENUE OF THE STATE
EW MEXICO, ET, AL,

*Respondent.*

On Writ of Certiorari to the Court of
Appeals of New Mexico

## INDEX

## Chronological List of Relevant Docket Entries

On or before June 15, 1968 — Petition of Protest

December 31, 1969 — Claim For Refund filed by the Mescalero Apache Tribe with the Bureau of Revenue, State of New Mexico.

January 19, 1970 — Letter Denial of Tribe's Claim for Refund

On or before Dec. 23, 1970 — Stipulation of Facts

December 23, 1970 — Decision and Order of the Commissioner of Revenue, Bureau of Revenue, State of New Mexico.

January 21, 1971 — Complaint on Appeal filed with the Court of Appeals, State of New Mexico

August 6, 1971 — Opinion and Judgment of the Court of Appeals of the State of New Mexico

August 26, 1971 — Motion for Re-Hearing

September 7, 1971 — Motion for Re-Hearing Denied

September 24, 1971 — Application for Writ of Certiorari to the Court of Appeals filed in The New Mexico Supreme Court

October 6, 1971 — Writ of Certiorari Denied by The New Mexico Supreme Court

December 4, 1971 — Petition For Certiorari to the Court of Appeals filed in The United States Supreme Court

April 24, 1972 — Petition For Certiorari Granted

BEFORE THE COMMISSIONER OF REVENUE, STATE OF NEW MEXICO. In the Matter of the Protest of the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, I. D. No 14-703019-00, Against Bureau of Revenue Assessment No. 66324 for Compensating Tax for the Period 9/1/63 to 4/30/68; and In the Matter of the Claim for Refund of the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, for Emergency School Tax for the Period 10/1/63 to 11/31/66.

## STIPULATION OF FACTS

The Mescalero Apache Tribe, hereinafter called "Tribe" and the Bureau of Revenue, State of New Mexico, hereinafter called "Bureau" hereby stipulate and agree, through their respective attorneys, as follows:

1. That the Tribe is an Indian Tribe which has a Treaty with the United States of America, a copy of which Treaty is marked Exhibit 1, attached hereto and incorporated herein by reference as if set forth in full.

2. That certain lands in Lincoln and Otero Counties of the State of New Mexico have been set aside as a reservation for the Tribe and on which the Mescalero Apache people reside and tribal business is primarily conducted.

3. Pursuant to 25 U.S.C.A., Section 476, the

Tribe, in 1934, adopted a Constitution, a copy of which is marked Exhibit 2, attached hereto and incorporated herein by reference as if set forth in full.

4. Sierra Blanca Ski Enterprises is a ski resort located in Otero and Lincoln Counties, New Mexico, and is exclusively owned and operated by the Tribe. The ski resort is on lands belonging to U. S. Forest Service which have been leased to the Tribe for a period of thirty (30) years. The ski resort area is bordered on the south by the Tribe's reservation and some of the cross-country ski trails are located on the reservation, but no part of the buildings or other equipment used at the ski resort is located within the now existing boundaries of the Tribe's reservation. That a map of said area is marked Exhibit 3, attached hereto and incorporated herein by reference. The Sierra Blanca Ski Enterprises, including the lease with the U. S. Forest Service, was entered into by the Tribe pursuant to Article XI, Section 1 of the Tribe's Constitution which is referred to in paragraph 3, above.

5. The enterprise at Sierra Blanca was entered into by the Tribe after a feasibility study was made by the Bureau of Indian Affairs of the United States of America, which feasibility study was paid for by the federal government.

6. The basic purpose of the ski resort is to provide revenue to the Tribe in lieu of raising revenue through the taxation of Tribal members or in some other manner. The revenue from the ski resort is to be used and is being used for the education, social and economic welfare of the Mescalero Apache people. The

ski resort also provides a job training center for the Mescalero Apache people and approximately 20 to 30 Mescalero Apache people are employed at the ski resort in a job training capacity.

7. The purchase and construction of the ski resort was financed completely by a loan to the Tribe by the federal government under 25 U.S.C.A., Section 470.

8. The approval of the Bureau of Indian Affairs of the Department of the Interior of the United States is required in several areas of the operation at the ski resort. For example, the approval of the Bureau of Indian Affairs must be obtained on:

a. The budget for each fiscal year.

b. The leasing of equipment or other property for use by the Tribe.

c. The leasing of facilities at the ski resort to concessionaires.

d. The plans and designs for the construction of any additional facilities or improvements.

e. The disposal of all property other than expendable items.

f. The form and contents of monthly interim reports and accounting records of the operation.

g. The form and contents of an annual audit which is to be conducted, and the licensed public accountant or firm of public accountants who will conduct the annual audit.

9. The Bureau conducted an audit in May of 1968 which resulted in Assessment No. 96224 being issued

gainst the Tribe for compensating tax in the amount of $5,837.19, plus interest of $893.82 and penalties of $[illegible].73, a copy of which assessment is marked Exhibit [illegible] attached hereto and incorporated herein by reference. The assessment can be broken down for the following periods: For September 1, 1963, to December [illegible], 1965, principal - $4,925.01; penalty - $492.50; interest - $232.89. For January 1, 1966, to April 30, 1968, principal - $962.18; penalty - $96.23; interest - $660.92. The assessment can also be broken down as follows: For September 1, 1963 to August 31, 1965, principal - $[illegible].74; penalty - $77.67; interest - $167.97. For September 1, 1965 to April 30, 1968, principal - $5,110.45; penalty - $511.05; interest - $725.85. The compensating tax assessed was a result of the compensating tax being applied against the purchase price of materials which were used to construct two ski lifts at the ski resort. At the time the audit was conducted and the assessment issued, the ski lifts had been completed and were permanently attached to the realty.

10. All the materials against which the compensating tax was assessed were purchased with money borrowed by the Tribe from the federal government pursuant to 25 U.S.C.A. Section 470, and the purchases of all such materials were subject to and were approved by the Bureau of Indian Affairs of the federal government.

11. The plans and specifications for the construction of the ski lift at the ski resort were approved by the federal government as evidenced by the letter to Wendell Chino, dated October 12, 1965, a copy of

which letter is marked Exhibit 5, attached hereto and incorporated herein as if set forth in full.

12. As a result of such assessment, the Tribe filed a written protest, a copy of which is marked Exhibit 6, attached hereto and incorporated herein by reference as if set forth in full. The written protest was timely filed by the Tribe as required by Section 72-13-38 of the Tax Administration Act. The written protest is hereby amended to include the additional ground on which the Tribe protests the assessment, namely the assessment is barred by the Statute of Limitations and that the Tribe is allowed to raise this defense at the hearing on its Protest of the Assessment.

13. That in December of 1967, the Tribe received the attached letter, marked Exhibit 7, and that such letter was written by the then Chief Counsel of the Bureau and that said letter is incorporated herein as if set forth in full. That in April of 1968, the Tribe received the attached letter marked Exhibit 8, and that such letter was written by the then General Counsel of the Bureau and that said letter is incorporated herein as if set forth in full.

14. That during the period of October 1, 1963, through December 31, 1965, the Tribe paid $15,529.60, and during the period of January 1, 1966, through December 31, 1968, the Tribe paid $10,586.78 in taxes to the Bureau on gross receipts received from its operation at the ski resort. That said sum was paid under the Emergency School Tax Act as amended, being Sections 72-16-1 through 72-16-47, N.M.S.A. 1953 Comp.

15. That a Claim for Refund of the Emergency School Taxes paid was filed by the Tribe on December 31, 1969; a copy of said Claim for Refund is marked Exhibit 9, attached hereto and incorporated herein as if set for (sic) in full. That by letter dated January 19, 1970, the Tribe's Claim for Refund was denied and within thirty (30) days from this denial, the Tribe filed a written request for a hearing on its Claim pursuant to Section 72-13-38, N.M.S.A. 1953 Comp.

16. That the Tribe's Petition of Protest, being Exhibit 6, attached hereto, and the Claim for Refund, being Exhibit 9, attached hereto, be consolidated and heard at the same administrative hearing, and that at such administrative hearing, the facts and statements contained in this Stipulation shall be treated as having been conclusively established by competent evidence and all such facts and statements shall be applicable to both the Petition of Protest and the Claim for Refund.

17. That it is understood the allegations and theories stated in the Petition of Protest and the Claim for Refund, being Exhibits 6 and 9 respectively, are to be considered as being the theories and allegations relied on and asserted by the Tribe at the administrative hearing to be held on this matter, but that the statements and facts contained in the Petition of Protest and the Claim for Refund are not stipulated to by the Bureau except as such statements and facts are established by this Stipulation.

18. That C. L. Sonnichsen is a recognized authority on the Mescalero Apache people and that his book entitled *The Mescalero Apaches*, published in 1958 by

Oklahoma Press at Norman, Oklahoma, is an accurate recording of factual events concerning the Mescalero Apache people and that judicial notice may be taken of the facts stated therein.

[Signatures Omitted in Printing]

# EXHIBIT 1

## FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA:

July 1, 1852.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME GREETING:

Preamble.

Whereas a Treaty was made and concluded at Santa Fé, New Mexico, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Captain Simon, Captain Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States, which treaty is in the words following, to wit:

Articles of a Treaty made and entered into at Santa Fé, New Mexico, on the first day of July in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9 Department and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache Nation of Indians, situate and living within the limits of the United States.

Authority of United States acknowledged.

Article 1. Said nation or tribe of Indians through their authorised Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit.

Peace to exist.

ARTICLE 2. From and after the signing of this Treaty hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist between said Indians and the government and people of the United States; the said nation, or tribe of Indians, hereby binding themselves most solemnly never to associate with or give countenance or aid to any tribe or band of Indians, or other persons or powers, who may be at any time at war or enmity with the government or people of said United States.

The Apaches not to assist other tribes in hostilities.

Good treatment of citizens of the United States by nations at peace with them.

ARTICLE 3. Said nation, or tribe of Indians, do hereby bind themselves for all future time to treat honestly and humanely all citizens of the United States, with whom they may have intercourse, as well as all persons and powers, at peace with the said United States, who may be lawfully among them, or with whom they may have any lawful intercourse.

Cases of aggression on them to be referred to government.

Laws to be conformed to.

ARTICLE 4. All said nation, or tribe of Indians, hereby bind themselves to refer all cases of aggression against themselves or their property and territory, to the government of the United States for adjustment, and to conform in all things to the laws, rules, and regulations of said government in regard to the Indian tribes.

Provisions against incursions into Mexico.

ARTICLE 5. Said nation, or tribe of Indians, do hereby bind themselves for all future time to desist and refrain from making any "incursions within the Territory of Mexico" of a hostile or predatory character; and that they will for the future refrain from taking and conveying into captivity any of the people or citizens of Mexico, or the animals or property of the people or government of Mexico; and that they will, as soon as possible after the signing of this treaty, surrender to their agent all captives now in their possession.

Persons injuring the Apaches to be tried and punished.

ARTICLE 6. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Apache Indian or Indians, he or they shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said States.

ARTICLE 7. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

Free passage over the Apache territory.

ARTICLE 8. In order to preserve tranquility and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate.

Military posts, agencies, and trading house to be established.

ARTICLE 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

Territorial boundaries to be adjusted.

ARTICLE 10. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Apache's Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures as said government may deem meet and proper.

Presents to the Apaches.

ARTICLE 11. This Treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

When treaty to be binding.

How construed.

In faith whereof we the undersigned have signed this Treaty, and affixed thereunto our seals, at the City of Santa Fé, this the first day of July in the year of our Lord one thousand eight hundred and fifty-two.

[Signatures omitted in Printing]

[Ratification by Senate omitted in Printing]

[Execution by President omitted in Printing]

[Map - U. S. Forest Lands (Exhibit 3) Omitted in Printing]

# REVISED CONSTITUTION
# MESCALERO APACHE TRIBE
# MESCALERO RESERVATION
# NEW MEXICO

APPROVED MARCH 25, 1936
REVISED JANUARY 12, 1965

EXHIBIT "2"

# REVISED
# CONSTITUTION OF THE APACHE TRIBE
# of the
# MESCALERO RESERVATION

## PREAMBLE

We, the members of the Apache Tribe of the Mescalero Reservation, in order to promote justice, insure tranquility, encourage the general welfare, foster the social and economic advancement of our people, safeguard our interests, bring our representative tribal government into closer alignment with State and National governments, and secure for ourselves and for our posterity the blessing of freedom and liberty, do hereby establish this revised constitution as the foundation upon which our tribal government shall rest.

## ARTICLE I — THE MESCALERO APACHE TRIBE

Section 1. The Apache Tribe of the Mescalero Reservation, hereinafter referred to as the Mescalero Apache Tribe, shall include all persons recognized as members thereof, or upon whom membership may be conferred, pursuant to the provisions and restrictions imposed by Article IV of this constitution, irrespective of the Apache Band with which they may be identified.

## ARTICLE II — TERRITORY

Section 1. The jurisdiction of the Mescalero Apache Tribe, its tribal council and courts shall ex-

tend to all the territory within the exterior boundaries of the reservation, and to such other lands as may be added thereto by purchase, gift, Act of Congress, or otherwise.

## ARTICLE III — RESERVATION LANDS

Section 1. Title to reservation lands shall remain tribal property and shall not, in whole or in part, be granted by allotment or otherwise to tribal members or groups of members as private property. The control of reservation lands, and of assignments or leases thereof, and of other tribal property, shall be in the tribal council, subject to applicable Federal authority, and regulated by ordinances not inconsistent with or contrary to this constitution.

Sec. 2. The tribal council shall have power to assign unused tribal lands, or to reassign any unused assignments, or portions thereof, which have been idle for two (2) or more years. No reassignment of a homestead may be made so long as the original assignee shall reside on the homesite, unless he shall voluntarily release the homesite to the tribe. A member may transfer his homesite to one of his children. The tribal council shall decide by ordinance what shall constitute a unit for purposes of assignment of land for private use, and shall determine the rules governing the use and transfer of such assignments.

Sec. 3. A non-member who is the surviving spouse of a member of the tribe shall have the privilege to use an assignment for the benefit of enrolled minor children, but a non-member shall not acquire any vested interest or rights in any tribal property,

except as otherwise provided by ordinance of the tribal council, or by applicable Federal law.

## ARTICLE IV — MEMBERSHIP

Section 1. The membership of the Mescalero Apache Tribe shall consist of the following persons:

(a) Any person whose name appeared on the Census Roll of the Mescalero Apache Agency of January 1, 1936.

(b) All persons born to resident members after the census of January 1, 1936, and prior to the effective date of this constitution.

(c) Any child born to a non-resident member, prior to the effective date of this constitution, provided that such child shall have resided on the Mescalero Reservation for not less than one (1) year immediately preceding the date of enrollment.

(d) Any person of one-fourth degree or more Mescalero Apache blood, born after the effective date of this constitution, either one or both of whose parents is (are) enrolled in the membership of the Mescalero Apache Tribe.

Sec. 2. No persons, being enrolled or recognized as a member of another tribe, shall be eligible for enrollment in the Mescalero Apache Tribe.

Sec. 3. The tribal council shall have the power to adopt ordinances, consistent with this constitution, governing future membership, loss of membership,

and the adoption of members into the Mescalero Apache Tribe, which ordinances shall be subject to review by the Secretary of the Interior.

Sec. 4. The tribal council shall have the power to prescribe rules to govern the compilation and maintenance of a membership roll, and to make corrections in the basic roll, subject to the approval of the Secretary of the Interior.

Sec. 5. The constitution of the Mescalero Apache Tribe, and ordinances enacted pursuant thereto, shall govern tribal membership and enrollment. No decree of any non-tribal court purporting to determine membership in the tribe, determine paternity, or determine the degree of Indian blood, shall be recognized for membership purposes. The tribal council shall have sole authority and original jurisdiction to determine eligibility for enrollment, except where the membership of an individual is dependent upon an issue of paternity, in which case the trial court, or the tribal council sitting as an appellate court, shall have authority and exclusive jurisdiction.

## ARTICLE V — BILL OF RIGHTS

Section 1. Subject to the limitations prescribed by this constitution, all members of the Mescalero Apache Tribe shall have equal political rights and equal opportunities to participate in the economic resources and tribal assets, and no member shall be denied freedom of conscience, speech, religion, association or assembly, nor shall he be denied the right to petition the tribal council for the redress of grievances against the tribe.

## ARTICLE VI — DISQUALIFICATION OF TRIBAL MEMBERS FOR ELECTIVE OFFICE

Section 1. No person who has been convicted of any felony or other serious offense, including adultery, bribery, embezzlement, extortion, fraud, forgery, misbranding, perjury, theft, habitual drunkenness, or felonious assault or felonious battery, shall be eligible for candidacy to any elective office of the Mescalero Apache Tribe unless he shall have been pardoned by the President of the Mescalero Apache Tribe in conformity with applicable ordinances and procedures prescribed by the tribal council.

## ARTICLE VII — ORGANIZATION OF THE GOVERNMENT OF THE MESCALERO APACHE TRIBE

Section 1. The powers of the government of the Mescalero Apache Tribe are divided into three distinct departments, the Legislative, the Executive and the Judicial, and no person or group of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as this constitution may otherwise expressly direct or permit.

## ARTICLE VIII — PART I — THE LEGISLATIVE DEPARTMENT: COMPOSITION AND QUALIFICATIONS

Section 1. The legislative powers of the Mescalero Apache Tribe shall rest in the Mescalero Apache Tribal Council, hereinafter referred to as the tribal

council, which shall hold its sessions at the seat of the tribal government.

Sec. 2. The tribal council shall consist of eight (8) members, elected at large from the membership of the Mescalero Apache Tribe.

Sec. 3. The members of the tribal council shall be at least twenty-five (25) years of age at the time of election or appointment (Article X, Section 4); shall have one-quarter or more Mescalero Apache Indian blood; shall have resided on the Mescalero Apache Reservation for a period of at least six (6) months immediately prior to the election, and shall be subject to the restrictions set out in Article VI.

Sec. 4. No person shall serve as a member of the Mescalero Apache Tribal Council while holding any other elective office, or policy making position with the tribe or with any organization doing business on the Mescalero Reservation.

## ARTICLE IX — NOMINATIONS AND ELECTIONS

[Omitted in Printing]

## ARTICLE X — VACANCIES AND REMOVAL FROM OFFICE

[Omitted in Printing]

## ARTICLE XI — POWERS OF THE TRIBAL COUNCIL

Section 1. The Mescalero Apache Tribal Council shall have the following duties and powers subject to all applicable laws of the United States, this consti-

tution, and the regulations of the Secretary of the Interior.

(a) To veto the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets, that may be authorized by any agency of government without the consent of the tribe; and any encumbrance, sale, grant, or lease of any portion of the reservation, or the grant of any rights to the use of lands or other assets, or the grant of relinquishment of any water or mineral rights or other natural or fiscal assets of the Mescalero Reservation, are hereby reserved to the sanction of the tribal council.

(b) To encumber, lease, permit, sell, assign, manage or provide for the management of tribal lands, interests in such lands or other tribal assets; to purchase or otherwise acquire lands or interests in lands within or without the reservation; and to regulate the use and disposition of tribal property of all kinds.

(c) To protect and preserve the property, wildlife and natural resources of the tribe, and to regulate the conduct of trade and the use and disposition of tribal property upon the reservation, provided that any ordinance directly affecting non-members of the tribe shall be subject to review by the Secretary of Interior.

(d) To adopt and approve plans of operation to govern the conduct of any business or industry that will further the economic well-being of the members of the tribe, and to undertake any activity of any nature whatsoever, not inconsistent with Federal law or with this constitution, designed for the social or economic improvement of the Mescalero Apache people, such plans of operation and activities to be subject to review by the Secretary of the Interior.

(e) To use tribal funds as loans or grants, and to transfer tribal property and other assets, to tribal corporations, associations, commissions or boards for such use as the tribal council may determine in conformity with this constitution and consistent with applicable Federal laws and regulations.

(f) To authorize the president to negotiate contracts, leases and agreements of every description not inconsistent with Federal law or with this constitution, subject to review or approval by the Secretary of the Interior which such review or approval is required by statute or regulations; Provided, that all contracts, leases and agreements so negotiated shall be subject to approval by the tribal council.

(g) To acquire, by condemnation, lands of tribal members on the reservation, for public purposes, provided that such mem-

bers shall be reimbursed the full value of improvements they have placed on such lands as determined by appraisal. The manner of appraisal and the procedures governing condemnation shall be established by ordinance of the tribal council, subject to review by the Secretary of the Interior.

(h) To regulate its own procedures, including the adoption and amendment of bylaws; to appoint subordinate boards, commissions, committees, tribal officials and employees not otherwise provided for in this constitution and to prescribe their salaries, tenure and duties; to charter tribal corporations, and to charter and regulate other subordinate organizations for economic and other purposes, subject to review by the Secretary of the Interior when required by Federal law or regulation.

(i) To represent the tribe and act in all matters that concern the welfare of the tribe and to make decisions not inconsistent with, or contrary to, this constitution.

(j) To negotiate with the Federal, State, or local Governments, and to advise and consult with representatives of the Interior Department on all activities that may affect the reservation, and in regard to all appropriation estimates and Federal projects for the benefit of the tribe before such

estimates or projects are submitted to the Bureau of the Budget and to Congress.

(k) To borrow money from the Federal Government or other lenders for tribal use.

(l) To administer any funds or property within the exclusive control of the tribe, and to make expenditures from available funds for public purposes of the tribe, including salaries and remuneration of elective officials, officers and tribal employees. With the approval of the Secretary of the Interior, tribal funds from any source may be authorized for dividend or per capita payments to the members of the tribe.

(m) To administer charity.

(n) To make loans to tribal members in accordance with regulations of the Secretary of the Interior, this constitution and other applicable laws.

(o) To employ legal counsel for the protection and advancement of the rights of the tribe and its members, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior, so long as such approval is required by Federal law.

(p) To enact ordinances, subject to review by the Secretary of the Interior, establishing and governing tribal courts and tribal law enforcement agencies on the reser-

vation; regulating social and domestic relations of members of the tribe; including provision for the issuance of decrees of divorce, provided that all marriages between tribal members shall be in conformity with applicable laws of the State; providing for the appointment of guardians for minors and mental incompetents; regulating the inheritance of personal property of tribal members; and providing for the removal or exclusion from the reservation of any nonmembers of the Mescalero Apache Tribe whose presence may be injurious to tribal members or to the interests of the tribe, as determined by the tribal council.

(q) To issue to each of its members a non-transferable certificate of membership, evidencing the equal share of each member in the assets of the tribe, said tribe poration, and to use any net income return to the tribe from corporate enterprises for public and social purposes of the tribe.

(r) To administer oaths; to require, upon proper notice being given stating time and place of hearing and the general nature of the subject to be discussed, any member of the tribe to appear and give testimony before the tribal council; and to provide by ordinance, subject to review by the Secretary of the Interior, for punishment of such members upon failure to comply with

such requirements, or for giving false testimony.

(s) To enact and provide for the enforcement of ordinances, subject to review by the Secretary of the Interior, for the assessment of taxes, licensing and other fees on persons or organizations doing business on the reservation.

(t) No authority or power contained in this constitution may de delegated by the Mescalero Apache Tribal Council, to tribal officials, committees, or associations to carry out any functions, or do any thing for which primary responsibility is vested in the tribal council, except by ordinance or resolution duly enacted by the tribal council.

(u) To deposit, to the credit of the Mescalero Apache Tribe, tribal funds, without limitation on the amount in any account, in any National or State bank whose deposits are insured by any agency of the Federal Government; Provided, that advances to the tribe from funds held in trust in the United States Treasury shall be deposited with a bonded disbursing officer of the United States whenever the conditions prescribed by the Secretary of the Interior in connection with such advance, require that the advance be so deposited.

(v) To exercise tribal powers indepen-

dently, under this constitution, whenever limitations on such free exercise of tribal powers, imposed by regulations of the Secretary of the Interior, are removed; to exercise other inherent powers not heretofore exercised or included in this constitution; and to exercise powers which have been excluded from tribal authority by applicable statutes of Congress, in the event such statutes are amended or rescinded; provided, that except for waiver of Secretarial review or approval authority, the exercise of additional tribal powers, by the tribal council, shall be in conformity with appropriate amendments to this constitution, pursuant to the provisions of Article XV and Article XXVII hereof.

## ARTICLE XII — REVIEW AND APPROVAL OF ENACTMENTS

Section 1. Every resolution or ordinance passed by the tribal council shall, before it becomes effective, be presented to the president for approval within five (5) days following the date of its passage. If he approves he shall sign it within ten (10) days following its receipt and deposit it with the Secretary of the Mescalero Apache Tribe for such further action as may be necessary. If he does not sign an enactment of the tribal council, he shall, at the next meeting of the tribal council following its submittal to him for signature, return it to the tribal council with a statement of his objections. It shall thereafter not become effective unless it is again approved by two-thirds of

the members present, providing that those present constitute a quorum of the tribal council.

Sec. 2. Every resolution or ordinance which, under this constitution is subject to review by the Secretary of the Interior, shall be, within ten (10) days following its approval by the president or, in the event of presidential veto, by a two-thirds majority of the tribal council as provided in Section 1 of Article XII above, presented to the Superintendent of the Mescalero Reservation. Within ten (10) days after receipt thereof, the Superintendent shall approve or disapprove the same.

Sec. 3. If the Superintendent shall approve any resolution or ordinance subject to review by the Secretary of the Interior, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may within ninety (90) days from the date of such approval by the Superintendent rescind the said resolution or ordinance for any cause, by transmitting notification to the President of the Mescalero Apache Tribe of such rescission.

Sec. 4. If the Superintendent shall refuse or fail to approve any resolution or ordinance submitted to him within ten (10) days after its receipt, he shall advise the tribal council of his reasons therefor, and if the reasons appear to the tribal council to be insufficient it may, by majority vote, refer the resolution or ordinance to the Secretary of the Interior who shall, within ninety (90) days from the date of receipt, approve or disapprove same in writing; Providing, how-

ever, that such resolution or ordinance shall become effective (90) days after the date of receipt unless the Secretary of the Interior shall disapprove in writing such resolution or ordinance.

Sec. 5. Any resolution or ordinance that is, by the terms of this constitution, subject to the approval of the Secretary of the Interior, shall be presented to the Superintendent who shall, within 10 days after receipt thereof, transmit the same to the Secretary of the Interior with his recommendation for or against approval.

Sec. 6. The said resolution or ordinance shall become effective when approved by the Secretary of Interior.

Sec. 7. Upon request by the tribal council, the Secretary of the Interior may waive any requirement contained in this constitution relating to review or approval of resolutions and ordinances, or to the exercise of other powers of the tribal council. Such waiver shall be for such period of time and under such conditions as the Secretary of the Interior may prescribe.

## ARTICLE XIII — TRIBAL BUDGET AND BUSINESS ENTERPRISES

Section 1. Before the beginning of each fiscal year, the tribal council shall adopt and approve an annual tribal budget providing funds for the support of all approved tribal programs. No expenditures of tribal funds may be made except in conformity with the approved budget. The annual tribal budget shall

be subject to such review and approval as may be required by the Secretary of the Interior.

Sec. 2. The Mescalero Apache Tribal Council shall, by ordinance, establish the principles and policies governing the operation and control of all enterprises of the tribe.

## ARTICLE XIV — REFERENDUM

Section 1. Upon receipt of a petition signed by at least thirty percent (30%) of the qualified voters of the tribe and filed with the secretary of the tribal council demanding a referendum thereon, any proposed or enacted resolution, ordinance or other action of the tribal council shall either be repealed by the tribal council or be submitted by it to the electorate for decision by the tribe in a general election to be held within thirty (30) days after receipt of the petition. The referendum shall be conclusive only if at least thirty percent (30%) of the qualified voters cast their ballots therein.

Sec. 2. When a majority of the members of the tribal council shall request a referendum on any proposed or enacted resolution, ordinance, or other action of the tribal council, the tribal council shall call an election within thirty (30) days thereafter at which the members of the tribe shall approve or disapprove, by majority vote, the ordinance or action in question; provided, however, that such approval or disapproval shall be effective only in the event thirty percent (30%) or more of the qualified voters cast their ballots in such election.

Sec. 3. No referendum conducted pursuant to the provisions of Section 1 above shall serve to abrogate, modify, or amend any properly approved contract or agreement with third parties who are not members of the Mescalero Apache Tribe.

## ARTICLE XV — CONSTITUTIONAL AMENDMENT

Section 1. This constitution may be amended at an election called by the Secretary of the Interior upon request by the tribal council:

(a) Whenever, by majority vote of all members of the tribal council, the governing body of the tribe shall authorize the submission of a proposed amendment to the electorate of the tribe, or,

(b) When a minimum of thirty percent (30%) of the qualified voters of the tribe, by signed petition, shall request such amendment.

Sec. 2. If, at such election, the amendment is adopted by majority vote of the qualified voters of the tribe voting therein, and if the number of ballots cast represents not less than thirty percent (30%) of the qualified voters, such amendments shall be submitted to the Secretary of the Interior and, if approved by him, it shall thereupon take effect.

## ARTICLE XVI — SESSIONS OF THE TRIBAL COUNCIL

[Omitted in Printing]

## ARTICLE XVII — QUORUM; VOTE

[Omitted in Printing]

## ARTICLE XVIII — ORDINANCES AND RESOLUTIONS

Section 1. All final decisions of the tribal council, on matters of permanent interest to members of the tribe and necessary to the orderly administration of tribal affairs, shall be embodied in ordinances, the format of which shall be established in the bylaws of the tribal council. Such enactments shall be available for public inspection at any reasonable times by members of the tribe.

Sec. 2. All final decisions of the tribal council on matters of temporary interest, or matters relating to particular individuals, officials or circumstances shall be embodied in resolutions. Such actions of the tribal council shall also be subject to public inspection by members of the tribe.

## ARTICLE XIX — PART 2 — THE EXECUTIVE DEPARTMENT: COMPOSITION AND MANNER OF SELECTION

Section 1. The Executive Department of the Mescalero Apache Tribal Government shall consist of a president, a vice-president, a secretary and a treasurer.

Sec. 2. The President and Vice-President of the Mescalero Apache Tribe shall be elected. The remain-

ing officers shall be appointed by the president with the concurrence of the tribal council, and persons appointed to fill such offices shall serve during the pleasure of the president, provided that the tribal council must concur in the removal from office of any such appointive officer of the tribe.

## ARTICLE XX —
## PRESIDENT AND VICE PRESIDENT: TERM OF OFFICE AND QUALIFICATIONS

[Omitted in Printing]

## ARTICLE XXI —
## PRESIDENT AND VICE PRESIDENT: VACANCIES AND REMOVAL FROM OFFICE

[Omitted in Printing]

## ARTICLE XXII — DUTIES OF OFFICERS

Section 1. The President of the Mescalero Apache Tribe shall exercise the following powers as the chief executive officer of the tribe:

(a) The president shall serve as the Chairman of the Mescalero Apache Tribal Council, but he shall not have the right to vote on any issue except to break a tie vote of the council in the absence of the vice-president.

(b) The president shall appoint all non-elected officials and employees of the exe-

cutive department of the tribal government and shall direct them in their work, subject only to applicable restrictions embodied in this constitution or in enactments of the tribal council establishing personnel policies or governing personnel management.

(c) The president, subject to the approval of the tribal council, may establish such boards, committees or subcommittees as the business of the council may require, and shall serve as an ex-officio member of all such committees and boards.

(d) The president shall serve as contracting officer for the Mescalero Apache Tribe, following approval of all contracts by the tribal council.

(e) The president shall have veto power over enactments of the tribal council, as provided in Article XII, Section 1.

(f) Subject to such regulations and procedures as may be prescribed by ordinance of the tribal council, the president shall have power to grant pardons, after conviction for all offenses, to restore tribal members to eligibility for elective office in the tribal government, subject to the restrictions contained in Article X, Section 1.

(g) The president shall direct the tribal police, to assure the enforcement of ordinances of the tribal council.

(h) The president shall hold no other tribal office or engage in private remunerative employment without the consent of the tribal council, during his term as president.

Sec. 2. In the absence of the president, the vice-president shall preside and shall have all powers, privileges and duties of the president.

Sec. 3. The vice-president may function as chairman of the tribal council or of any committee thereof in the absence of, or at the direction of, the president. When presiding as chairman of the tribal council he shall have the right to vote only in the event the council or any committee thereof is equally divided on an issue. In his capacity as vice-president, he may be counted for purposes of constituting a quorum at any such meeting and when so counted may vote on any business then before the council.

Sec. 4. The vice-president may attend any session of the tribal council or of any council committee and he may participate therein, but he shall not have the right to vote unless required to make a quorum or to break a tie.

Sec. 5. The vice-president shall perform such other duties as the president, with the consent of the tribal council, may direct.

## ARTICLE XXIII — THE SECRETARY OF THE MESCALERO APACHE TRIBE

[Omitted in Printing]

## ARTICLE XXIV — TREASURER OF THE MESCALERO APACHE TRIBE

Section 1. The treasurer shall be appointed from within the membership of the tribal council.

Sec. 2. (a) The treasurer shall accept, receipt for, keep and safeguard all funds under the exclusive control of the tribe by depositing them in a bank insured by an agency of the Federal Government, or in an Individual Indian Money Account as directed by the Mescalero Apache Tribal Council, and shall keep an accurate record of such funds and shall report on all receipts and expenditures and the amount and nature of all funds in his custody to the council at regular meetings and at such other times as requested by the council. He shall not pay or otherwise disburse any funds in custody of the council except when properly authorized to do so by the council.

(b) The books and records of the treasurer shall be audited at least once a year by a competent auditor employed by the council, and at such other times as the council may direct.

(c) The treasurer shall be required to give a surety bond satisfactory to the council and the Commissioner of Indian Affairs.

(d) The treasurer shall be present at all meetings of the council unless prevented by circumstances beyond his control.

(e) All checks shall be signed and all vouchers shall be approved for payment by two

officers of the tribe as follows: the president or the vice-president, together with the treasurer or, in his absence, the secretary.

(f) In the absence of the president, vice-president and secretary, the treasurer shall carry on the duties of the president.

Sec. 3. The tribal council may require all responsible tribal officials and employees to be bonded. The premium for the bond shall be paid by the tribe.

## ARTICLE XXV — PART III — THE JUDICIARY
## JUDICIAL POWERS

Section 1. The judicial powers of the Mescalero Apache Tribe shall be vested in the tribal court, including a trial and appellate court, which courts shall exercise jurisdiction in all criminal matters, except those matters within the exclusive jurisdiction of the Federal and State Courts, wherein the defendants are members of the Mescalero Apache Tribe or members of other Indian tribes residing within the Mescalero Reservation; and may exercise jurisdiction in all civil matters wherein only members of the Mescalero Apache Tribe are involved.

Sec. 2. The criminal offenses over which the Courts of the Mescalero Apache Tribe have jurisdiction may be embodied in a Code of Laws, adopted by ordinances of the tribal council, and subject to review by the Secretary of the Interior.

Sec. 3. The duties and procedures of the courts shall be determined by ordinance of the tribal council.

## ARTICLE XXVI — COMPOSITION OF THE TRIBAL COURTS

Section 1. The trial court shall consist of a chief judge and two associate judges, appointed by the President of the Mescalero Apache Tribe, with the concurrence of not less than a three-fourths majority vote of the whole membership of the tribal council.

Sec. 2. The tribal council shall sit as a court of appeals whenever necessary and may hear appeals at any regular or special meeting.

Sec. 3. The tenure and salary of tribal judges shall be established by ordinance of the tribal council.

Sec. 4. No person shall be appointed to the office of tribal judge unless he is an enrolled member of the Mescalero Apache Tribe, not less than 35 years nor more than 70 years of age; nor shall any person be appointed as a tribal judge who has ever been convicted of a felony or, within one year, the last past, of a misdemeanor.

## ARTICLE XXVII — INHERENT POWERS OF THE MESCALERO APACHE TRIBE

Section 1. No provision of this constitution shall be construed as a limitation on the inherent residual sovereign powers of the Mescalero Apache Tribe. Any such powers, not delegated to the representative tribal government by this constitution, are retained for direct exercise by the people through referendum, as provided for herein, or for exercise by the tribal government following amendment of the constitution.

## ARTICLE XXVIII — SAVING CLAUSE AND REPEAL OF PREVIOUS CONSTITUTION

Section 1. The Constitution and Bylaws of the Apache Tribe of the Mescalero Reservation, approved on March 25, 1936, under the provisions of Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378), is hereby repealed and superseded by this constitution.

Sec. 2. All ordinances and resolutions heretofore enacted by the Mescalero Tribal Business Committee shall remain in full force and effect to the extent that they are not inconsistent with this constitution.

Sec. 3. The incumbent tribal business committee and incumbent tribal officers shall remain in office and shall be entitled to exercise all powers granted by this constitution to the tribal council and tribal officers until such time as the first election of the tribal council and tribal officers is held under this constitution.

## ARTICLE XXIX — OATH OF OFFICE

[Omitted in Printing]

## ARTICLE XXX — RATIFICATION OF REVISED CONSTITUTION

Section 1. This constitution, when adopted by a majority vote of the qualified voters of the Mescalero Apache Tribe, voting at an election called for that purpose by the Secretary of the Interior, in which at least thirty percent (30%) of those entitled to vote

shall cast their ballots, shall be submited to the Secretary of the Interior for his approval, and shall be effective from the date of approval.

## CERTIFICATION OF ADOPTION

Pursuant to an election authorized by the Secretary of the Interior on December 11, 1964, the attached Revised Constitution of the Apache Tribe of the Mescalero Reservation was submitted to the qualified voters of the tribe and was on December 18, 1964, duly adopted by a vote of 190 for and 103 against, in an election in which at least 30 percent of the 635 members entitled to vote cast their ballot in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

KENNETH L. PAYTON
*Chairman, Election Board*

CHRISTIE LA PAZ
*Election Board Member*

ALTON PESO
*Election Board Member*

## APPROVAL

I, John A. Carver, Jr., Under Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attach-

Revised Constitution of the Apache Tribe of the Mescalero Reservation.

Approval recommended:
JAMES E. OFFICER
*Associate Commissioner*
*Bureau of Indian Affairs*

JOHN A. CARVER, JR.
*Under Secretary of the Interior*
[SEAL]

WASHINGTON, D. C., *January* 12, 1965

COMMISSIONER, BUREAU OF REVENUE—STATE OF NEW MEXICO—SANTA FE, NEW MEXICO

## NOTICE OF ASSESSMENTS OF TAXES

ASSESSMENT 96224
(Invalid If Assessment No. Is Not Shown)
DATE ISSUED May 16, 1968
(Date of Mailing or of Delivery in person)
REPORTING PERIOD 9/1/63 to 4/30/66
NEW MEXICO
IDENTIFICATION NO. 18-703019-00
PERMIT NO. 6

Sierra Blanca Ski Enterprises
Box 176
Mescalero, N. Mex.

| Type of Tax | Tax Due | Penalties & Interest Due | Total Amount Due |
|---|---|---|---|
| 1. Gross Receipts Tax | | | |
| 2. Municipal Tax-Municipality | | | |
| 3. Compensating Tax | 5,887.19 | 1,482.55 | 7,369.74 |
| 4. Income Tax Withheld | | | |
| 5. Gasoline or Motor Fuel Tax-Class No. | | | |
| 6. Liquor Tax | | | |
| 7. Cigarette Tax | | | |
| 8. Severance Tax | | | |
| 9. Succession Tax | | | |
| TOTAL | 5,887.19 | 1,482.55 | |
| | (4) | (6) | |

Please Remit This Amount Within 30 Days After The Date Of Issuance. Failure To Pay May Render The Taxpayer Subject To The Assessment Of Additional Interest And Levy. For Alternative Remedies, See Reverse Side. $7,369.74

Explanation of Liability:

As per Audit by Romero & Maestas
Dated 5/10/68
Compensating Tax:
Balance due $5,887.19
Interest 973.82
Penalty 508.73
Total due $7,369.74

REQUESTING DIVISION Audit
BY Approved Billing Section
(Stamped)

Misc

Signature Date

For The Commissioner

[Instructions omitted in Printing]

EXHIBIT "4"

Credit
Ski Enterprises
Improvements

Mescalero Indian Agency
Mescalero, New Mexico
Oct. 12, 1965

Mr. Wendell Chino, President
Mescalero Apache Tribal Council
Mescalero, New Mexico

Dear Mr. Chino:

This is to advise that the lift plans and specifications for the new double chairlift of the Tribal Ski Enterprise are formally approved by delegated authority to this office September 29, 1965 in accordance with the temporary plan of operation still in effect at this time. In like manner, your official approval of the plans and specifications is requested for the record by your signature below.

Please sign the original and three (3) copies. Retaining one copy for your record and return the original and two (2) copies for our distribution.

s/Kenneth L. Payton
Superintendent

The plans and specifications for one (1) double chairlift to be installed at the Sierra Blanca Ski Resort, a Tribal Enterprise, are hereby approved.

[Signatures omitted in printing]

EXHIBIT "5"

COMMISSIONER
BUREAU OF REVENUE
STATE OF NEW MEXICO

PROTEST OF ASSESSMENT NO. 96224 ISSUED 5/16/68, FOR COMPENSATING TAX FOR THE PERIOD OF 9/1/63 to 4/30/68 OF $7,369.74 to SIERRA BLANCA SKI ENTERPRISES, BOX 176, MESCALERO, NEW MEXICO

COMES NOW the Mescalero Apache Tribe by and through its attorneys, Fettinger, Bloom & Overstreet of Alamogordo, New Mexico, and protests the above assessment made by the Bureau of Revenue of the State of New Mexico upon the following grounds and theories and upon the following authorities and the grounds and theories set forth in those authorities:

1. That the Mescalero Apache Tribe is an Indian Tribe recognized by the United States as evidenced by the Treaty of July 1, 1852, 10 Stat. 979. See also 15 Indian Claims Commission 532,decided 6/9/67.

2. That the Mescalero Apache Tribe is the owner and operator of Sierra Blanca Ski Enterprises subject to the supervision and control of the United States.

3. That the financing of the operation at Sierra Blanca, including the purchase of the property assessed was obtained by funds from the United States under 25 U.S.C.A. Section 470.

4. That the purchase of the property against

which this Assessment was made was approved by the United States.

5. That the net proceeds received from the operation at Sierra Blanca is used for the educational, social and economic benefit of the Mescalero Apache people.

6. That the Mescalero Apache Tribe is not a "person" as defined in N.M. Session Laws, 1939, Ch. 95, Section 2, as amended, of the Compensating Tax Act of 1939, and therefore the assessment is invalid and improper based on:

A. *Choteau v. Commissioner of Internal Revenue*, 38 F.2d 976 (1930).

B. Internal Revenue Ruling No. 67-284.

7. That the Mescalero Apache Tribe is an agency, instrumentality, department, institution or political subdivision of the United States and therefore exempt from the assessment under New Mexico Session Laws, 1939, Ch. 95, Section 4, as amended, of the Compensating Tax Act of 1939, and also under the following authorities:

A. *United States v. Thurston County*, 143 Fed. 287 (1906).

B. *Choteau v. Burnet*, 283 U.S. 691 (1931).

C. *Clallum County v. United States*, 263 U. S. 341 (1923).

D. *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

8. That the application of the New Mexico Compensating Tax on property belonging to the Mescalero

Apache Tribe at Sierra Blanca is inconsistent with the Treaty of July 1, 1852, 10 Stat. 979, 25 U.S.C.A. Section 465 and 25 U.S.C.A. Section 476; U.S. CONST. art. I, Section 8; U.S. CONST. amend. V; U.S. CONST. amend. XIV, Section 1; N.M. CONST. art. XXI, Section 2; and N.M. CONST. art. II, Section 18.

9. That the assessment is invalid and improper because such assessment interferes with an Indian tribe's right to self government based on:

A. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

B. *Williams v. Lee*, 358 U.S. 217 (1959).

C. *Warren Trading Post v. Tax Comm'n.*, 380 U.S. 685 (1965).

D. *Ghahate v. Bureau of Revenue*, 80 N.M. 98 (Ct. App.), 451 P.2d 1002 (1969).

E. 25 U.S.C.A. Section 476.

F. *Morgan v. Colorado River Indian Tribe*. 103 Ariz. 425, 443 P.2d 421 (1968).

G. *McCulloch v. Maryland*, supra.

H. *Clallum County v. United States*, supra.

10. That the State of New Mexico has no jurisdiction to tax the Mescalero Apache Tribe because exclusive jurisdiction over such tribe is vested in United States government, based on:

A. Treaty of July 1, 1852, 10 Stat. 979.

B. N.M. CONST. art. XXI, Section 2.

C. U.S. CONST. art. 1, Section 8.

D. *Your Food Stores, Inc. (NSL) v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 (1961).

E. *Worcester v. Georgia*, supra.
F. *Williams v. Lee*, supra.
G. *Warren Trading Post v. Tax Comm'n.*, supra.

11. That the operation of Sierra Blanca Ski Enterprises is for charitable and educational purposes and that the property against which this assessment was made was used for charitable and educational purposes and therefore such use is exempt under N.M. Session Laws, 1939, Ch. 95, Section 4, as amended, of the Compensating Tax Act of 1939.

12. That the imposition or collection of this tax on the Mescalero Apache Tribe is a denial of the equal protection of the laws and a taking of property without due process of law all in violation and prohibited by the U.S. CONST. amend. V and U.S. CONST. amend. XIV, Section 1 and N.M. CONST. art. II, Section 18.

13. That the Bureau of Revenue is estopped from assessing the Compensating Tax during this period because the Mescalero Apache Tribe's failure to pay the Compensating Tax on the property assessed was in reliance upon rulings and regulations of the Bureau of Revenue.

Based on the above grounds and authorities, the Mescalero Apache Tribe respectfully requests that the above assessment be cancelled.

[Signatures omitted in printing]

STATE OF NEW MEXICO
BUREAU OF REVENUE
SANTA FE
87501

L. A. McCULLOCH, JR.
Chief Counsel

December 13, 1967

Mescalero Apache Tribe
Box 176
Mescalero, New Mexico

Re: Mescalero Apache Tribe, d/b/a
Sierra Blanca Ski Entr
Identification No. 18-703019-00
Exemption Request and Nontaxable Transaction Certificate

Gentlemen:

The application for a Nontaxable Transaction Certificate that you returned to the Records Division has been forwarded to my office for analysis to determine if the above referenced organization qualifies.

Under N.M.S.A. Sec 72-16A-12 (A) 53 Comp. (67 P.S.) gross receipts of political subdivisions of the United States and the State of New Mexico are exempt from taxation.

Also, use of property by political subdivisions of the United States and the State of New Mexico is exempted from the compensating tax by N.M.S.A. Sec 72-16A-12 (B) 53 Comp. (67 P.S.).

EXHIBIT "7"

In addition, by the provisions of N.M.S.A. Sec 72-16A-14 (G) 53 Comp. (67 P.S.) the governing body of any Indian Tribe or Indian Pueblo are permitted to make tax deductible purchases of tangible personal property without furnishing the seller with any form of documentation, such as the Nontaxable Transaction Certificate. Even without this documentation, the seller may deduct these receipts from his gross receipts when reporting.

You are reminded that the Gross Receipts and Compensating Tax Act makes no provisions for a tax deduction by the seller when the purchaser is leasing or accepting a service rather than the purchase of tangible personal property.

Please advise if I may be of further service.

[Signatures omitted in printing]

April 16, 1968

Mescalero Apache Tribe
P. O. Box 176
Mescalero, New Mexico

RE: Sierra Blanca Ski Enterprise
Id. #18-703019-00

Gentlemen:

We find it necessary to call attention to an incomplete statement of the law made in a letter to you from the Legal Division of the Bureau of Revenue. The letter (dated December 13, 1967) concerned an application which you filed with the Bureau of Revenue asking for a nontaxable transaction certificate.

Because of certain matters omitted from that letter, it probably left the erroneous impression that none of the business transactions, purchases, or income of Indian tribes are taxable by the State of New Mexico. As a matter of fact, many such activities are taxable.

We first call your attention to the fact that there is no exemption whatever to Indian tribes, insofar as our sales or gross receipts tax is concerned. In other words, any money received by an Indian tribe from business operations, including leasing, is taxable by the Bureau of Revenue of the State of New Mexico. The tax rate upon the gross receipts from any such business is 3%.

Likewise, any equipment or other tangible personal property purchased outside the State of New Mexico and imported into the State of New Mexico for use within the State, and upon which the sales or gross

EXHIBIT "8"

receipts tax has not been paid, is taxable under the New Mexico Compensating Tax Act.

Prior to July 1, 1967, the material portion of our compensating or use tax act (Section 72-17-3, N.M.S.A., 1953 Compilation) reads, as follows:

> "An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased from a retailer on or after July 1, 1939, and stored, used or consumed in this state . . . ."

Effective July 1, 1967, the above quoted compensating tax statute was repealed, and Section 72-16A-7, N.M.S.A., 1953 Compilation (1967 Pocket Supplement) became the law in its stead. The material portion of that new section, which continues as the law, reads as follows:

> "For the privilege of using property in New Mexico, there is imposed on the person using property an excise tax equal to three per cent (3%) of the value, at the time of acquisition or of introduction into the state, whichever is later, of the property that was acquired outside the state as the result of a transaction that would have been subject to the gross receipts tax had it occurred within this state."

This new compensating tax statute, which became effective July 1, 1967, contains certain exemptions.

One of these exemptions is in Section 72-16A-12, B. and reads, as follows:

> "Exempted from the compensating tax is the use of property by the governing body of any Indian tribe or Indian pueblo *on Indian reservations or pueblo grants.*"

Likewise, businessmen who sell property to others are permitted by the 1967 law to deduct from their taxable receipts the proceeds from certain of their sales. Thus, we find this provision in Section 72-16A-14, G:

> "Receipts from selling tangible personal property, other than nonfissionable metalliferous mineral ore, to the governing body of any Indian tribe or Indian pueblo *for use on Indian reservations* or pueblo grants, may be deducted from gross receipts."

You will note that our statute limits the tax deductible sales to receipts from sales of tangible personal property to Indian tribes *"for use on Indian reservations."*

It is our information that Sierra Blanca Ski Enterprise is not located on your reservation, and hence our sales or gross receipts tax statutes as well as our compensating tax statutes, apply to that entire operation. Compensating tax statutes would apply, as mentioned above, to all tangible personal property acquired for use in connection with the Sierra Blanca Ski Enterprise.

The sales or gross receipts tax statutes apply to all income of your Tribe received from that skiing operation. This would include not only the income from facilities actually operated by your Tribe, but would

also include the income from facilities owned by you but leased to others who are the actual operators. The income you receive from such leased facilities is taxable income. The tax rate is 3% of the gross amount received by you.

We regret any misunderstanding or inconvenience which may have been occasioned your tribe by reason of the incomplete statement of the law contained in the letter which was sent to you under date of December 13, 1967. The language of that letter only today came to our attention, and hence we hasten to correct any misunderstandings which may have arisen as a result of that letter.

We mention also that the second and third paragraphs of the letter dated December 13, 1967, concerned the tax status of the United States of America and of the State of New Mexico. The matters stated in those two paragraphs do not apply in any way to Indian tribes, and for your purposes may be ignored.

Sincerely yours,
Adolf J. Krehbiel
General Counsel

COMMISSIONER FRANKLIN JONES
BUREAU OF REVENUE
STATE OF NEW MEXICO
SANTA FE, NEW MEXICO

CLAIM FOR REFUND

COMES NOW, the MESCALERO APACHE TRIBE by and through its attorneys, FETTINGER, BLOOM & OVERSTREET, of Alamogordo, New Mexico, and states as its claim for refund the following:

1. That the Mescalero Apache Tribe is an Indian Tribe recognized by the United States as evidenced by the Treaty of July 1, 1852, 10 Stat. 979. See also 15 Indian Claims Commission 532, decided 6/9/67.

2. That the Mescalero Apache Tribe is the owner and operator of Sierra Blanca Ski Enterprises subject to the supervision and control of the United States.

3. That for the period of October 1, 1963, through December 31, 1966, the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, New Mexico Identification No. 14-703019-00, paid a total of $26,086.47 in taxes to the Bureau of Revenue on gross receipts received from their operation at Sierra Blanca. That said sum of $26,086.47 was paid under the Emergency School Tax Act as amended, being N.M. Session Laws, 1935, Ch. 73.

4. That the financing of the operation at Sierra Blanca, including the purchase of the property used to construct Sierra Blanca Ski Enterprises, was obtained by funds from the United States under 25 U.S.C.A. Section 470.

Exhibit No. 9

5. That the net proceeds received from the operation at Sierra Blanca are used for the educational, social and economic benefit of the Mescalero Apache people.

6. That the Mescalero Apache Tribe is not a person as defined in N.M. Session Laws, 1961, Ch. 189, Section 1, of the Emergency School Tax Act, supra and therefore all taxes paid thereunder were erronously paid.

7. That the Mescalero Apache Tribe is an agency, instrumentality, department, institution or political subdivision of the United States and therefore exempt from the payment of any taxes imposed by the Emergency School Tax Act, supra, based on the following authorities:

A. *United States v. Thurston County*, 143 Fed. 287 (1906).

B. *Choteau v. Burnet*, 283 U.S. 691 (1931).

C. *Clallum County v. United States*, 263 U.S. 341 (1923).

D. *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

8. That the assessment and payment of taxes by the Mescalero Apache Tribe on its operations at Sierra Blanca is inconsistent with the Treaty of July 1, 1852, 10 Stat. 979; 25 U.S.C.A. Section 465 and 25 U.S.C.A. Section 476; U. S. CONST. art. 1, Section 8; U. S. CONST. amend. V; U. S. CONST. amend. XIV, Section 1; N.M. CONST. art. XXI, Section 2; N.M. CONST. art. II, Section 18.

9. That the assessment and payment of these

[illegible] by the Mescalero Apache Tribe is invalid and improper because such payment of taxes interferes with an Indian Tribe's right to self government based on:

A. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

B. *Williams v. Lee*, 385 U. S. 217 (1959).

C. *Warren Trading Post v. Tax Comm'n.*, 380 U.S. 685 (1965).

D. *Ghahate v. Bureau of Revenue*, 80 N.M. 98 (Ct. App.) 451 P.2d 1002 (1969).

E. 25 U.S.C.A. Section 476.

F. *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968).

G. *McCulloch v. Maryland*, supra.

H. *Clallum County v. United States*, supra.

10. That the State of New Mexico has no jurisdiction to tax the Mescalero Apache Tribe because exclusive jurisdiction over such tribe is vested in United States Government, based on:

A. Treaty of July 1, 1852, 10 Stat. 979.

B. N.M. CONST. art. XXI, Section 2.

C. U.S. CONST. art. I, Section 8.

D. *Your Food Stores, Inc. (NSL) vs. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 (1961).

E. *Worcester v. Georgia*, supra.

F. *Williams v. Lee*, supra.

G. *Warren Trading Post v. Tax Comm'n.* supra.

11. That the payment of this tax by the Mescalero Apache Tribe constitutes a denial of equal protection of the laws and if not refunded will constitute a taking of property without due process of law, all in violation and prohibited by the U.S. CONST. amend. V and U.S. CONST. amend. XIV, Section 1 and N.M. CONST. art. II, Section 18.

12. That the Bureau of Revenue is estopped from asserting the taxes paid during this period are due because the Bureau of Revenue has taken the position in its rulings and regulations that an Indian Tribe is not subject to tax on its gross receipts.

Based on the above grounds and authorities, Petitioner hereby requests a refund of the taxes paid under the Emergency School Tax Act for the period October 1, 1963, to December 31, 1966. This claim for refund is being submitted pursuant to Section 72-13-40 of the Tax Administration Act.

[Signatures omitted in printing]

Filed December 23, 1970

Bureau of Revenue
State of New Mexico

In the Matter of the Protest of the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, I.D. No 14-703019-00, Against Bureau of Revenue Assessment No. 96224 for Compensating Tax for the Period 9/1/63 to 4/30/68; and In the Matter of the Claim for Refund of the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, for Emergency School Tax for the Period 10/1/63 to 11/31/66.

DECISION AND ORDER

THIS MATTER came for hearing before the Commissioner, and on the basis of the facts and evidence as contained in the stipulation, hereby made a part of the record, the Commissioner decided and ordered that:

1) The protest, which was timely filed, to Bureau of Revenue Assessment Number 96224 by the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises is hereby denied.

2) The claim for refund for taxes paid under the Emergency School Tax Act for the period October 1, 1963 to December 31, 1966, which was timely filed by the Taxpayer, is hereby denied.

3) The Taxpayer is a "person" as that term is defined in the Emergency School Tax Act

[Laws of 1961, ch. 189, Section 1 and Laws of 1963, ch. 206, Section 1], the Compensating Tax Act of 1939 [Laws 1939, ch. 95, Section 2], and the Gross Receipts and Compensating Tax Act (Section 72-16A-3(G), N.M. S.A. 1953 (Supp. 1967) [Laws of 1966, ch. 47, Section 3].

4) The Taxpayer's storage use or other consumption of tangible personal property in New Mexico is not exempted under the Compensating Tax Act of 1939 [Laws 1961, ch. 192, Section 1 and Laws of 1965, ch. 68, Section 1] or under the Gross Receipts and Compensating Tax Act, Section 72-16A-12, N.M.S.A. 1953 (Supp. 1967) [Laws of 1966, ch. 47, Section 12; Laws of 1966, ch. 59, Section 3; and Laws of 1967, ch. 298, Section 1].

5) The imposition of the Emergency School Tax, gross receipts tax, or compensating tax upon the taxpayer is not unconstitutional under either the Constitution of the United States or the Constitution of the State of New Mexico.

6) The Emergency School Tax which Taxpayer paid and then claimed refund upon, was properly imposed and Taxpayer was not exempted from that tax under the Emergency School Tax Act.

7) Assessment Number 96224 is not barred by any Statute of Limitations.

8) The Bureau of Revenue is not estopped from collecting the taxes referred to above by any

provision of the Emergency School Tax Act, the Compensating Tax Act of 1939 or the Tax Administration Act.

Done this 23 day of December, 1970, in Santa Fe, New Mexico.

/s/ Franklin Jones
Franklin Jones
Commissioner of Revenue

Filed January 21, 1971

IN THE COURT OF APPEALS
STATE OF NEW MEXICO

NO. 635

THE MESCALERO APACHE TRIBE,

*Appellant,*

*vs.*

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

*Appellees.*

COMPLAINT ON APPEAL

THE MESCALERO APACHE TRIBE, pursuant to Sections 16-7-8(F) and 72-13-39, N.M.S.A., 1953 Comp., hereby appeals from the written decision and order of the Commissioner of the Bureau of Revenue, and states:

1. The order and decision from which this appeal was taken was entered on December 23, 1970, and was mailed to Appellant's attorneys on December 24, 1970. A copy of the order and decision is marked Exhibit "A", attached hereto and incorporated herein.

2. That arrangements have been made with the Commissioner's delegate for preparation of a sufficent number of transcripts of the record of this case,

at the expense of Appellant, including three copies which shall be furnished the Commissioner.

WHEREFORE, APPELLANT PRAYS this Court to reverse the order and decision of the Commissioner by granting Appellant's Claim for Refund and by abating the assessment made by the Commissioner.

[Signatures omitted in printing]

[Exhibit omitted in printing — appearing in prior portion of Appendix]

Rehearing denied Sept. 7, 1971

Certiorari denied 10/6/71

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

[Title omitted in printing]

Filed August 6, 1971

## OPINION

HENDLEY, Judge.

The Bureau of Revenue (Bureau) imposed a compensating tax on the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises (Tribe) based upon the purchase price of materials used to construct two ski lifts. The Bureau also imposed an emergency school tax on the gross receipts of the operation of the ski resort. The Tribe protested the compensating tax assessment and also filed a claim of refund for the sums paid under the emergency school tax assessment. The Bureau ruled adversely on the Tribe's protest of the compensating tax assessment and the claim of refund of the school taxes. The Tribe appeals directly to this court pursuant to § 72-13-39, N.M.S.A. 1953 (Supp. 1969).

We affirm.

This appeal is based upon a stipulation of facts entered into by the Tribe and the Bureau, a summary of which is as follows. The Tribe is a treaty tribe residing on reservation lands situated within the counties of Lincoln and Otero in the State of New Mexico and has adopted a constitution in accordance with

governmental regulations. The ski resort is also located in Lincoln and Otero Counties and is on lands belonging to the United States Forest Service under a thirty year lease to the Tribe, except for some of the cross-country ski trails which are on reservation lands. No part of the ski resort buildings or equipment are located within the boundaries of the Tribe's reservation. The basic purpose of the ski resort is to provide revenue which is used for educational, social and economic welfare of the Tribe. The ski resort also provides a job training center for approximately twenty to thirty tribal members. The purchase and construction of the ski resort was totally financed by a loan from the Federal Government pursuant to 25 U.S.C.A. § 470. The approval of the Bureau of Indian Affairs of the Department of Interior is required for the ski resort budget for each fiscal year, leasing of equipment or other property, leasing facilities to concessionaires, plans and designs for construction of additional facilities or improvements, disposal of property other than expendable items, form and contents of monthly interim reports and accounting records and other related areas dealing with the ski resort.

On appeal the Tribe asserts: (1) the State has no authority to tax the Tribe; (2) assuming it has authority to tax the Tribe, the State, in its statutes, has not attempted to tax the Tribe; and (3) the Tribe is exempt from taxation because it is a federal instrumentality.

## I. AUTHORITY TO TAX

The Tribe contends that the State has no authority to tax because: (a) exclusive jurisdiction over

the Tribe is vested in the Federal Government; (b) it is inconsistent with the Treaty between the Tribe and the Federal Government; and (c) it interferes with the Tribe's right to self-government.

(a) Exclusive Jurisdiction.

It is the Tribe's contention that the Treaty between the Tribe and the United States Government, which became effective March 25, 1883, vests exclusive jurisdiction over the Tribe in the Federal Government. Article I of the Treaty states:

> "Article 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit."

The Tribe further contends that this argument is buttressed by Article I, Section 8 of the United States Constitution which states that the United States Congress shall have power "To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes; . . ."

We agree with the Tribe on this general proposition, but we must call attention to the fact that the Tribe submitted to the United States "power and authority." Subsequently, the United States Congress, on June 20, 1910, 36 Statutes at Large, 557, ch. 310, enacted the Enabling Act for New Mexico. Section 2, second, after stating that Indian land shall be under

the absolute jurisdiction and control of the Congress of the United States, stated in part:

> ". . . [B]ut nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe."

This Enabling Act is a specific grant of power which was later incorporated into Article XXI, Section 2, of the New Mexico Constitution wherein the almost identical language was adopted.

Consequently, by virtue of the Enabling Act the Federal Government permitted the State of New Mexico to tax, ". . . as other lands and other property are taxed, any lands and other property outside of an Indian reservation. . . owned or held by any Indian."

The Tribe contends that under Article VI, (Clause 2) of the United States Constitution, when there is a conflict between a Treaty and the provision of a State Constitution or statute, regardless of whether the State constitutional or statutory provision is prior to or subsequent to the making of the Treaty,

the Treaty will control. United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937). We agree with this general proposition, however, we do not find the Treaty to be in conflict with the provisions of the New Mexico Constitution or any of its statutes when the tax is on lands or properties located off Indian land. The Treaty submits the Tribe to the laws of the United States, and the Enabling Act permits New Mexico to tax in this situation.

The Tribe contends the lease of the Federal Forest Service lands was an acquisition of land under 25 U.S.C.A. § 465, which permits the Secretary of Interior to acquire lands within or without existing reservations for the purpose of providing lands for Indians. 25 U.S.C.A. § 465 provides that title to "any lands or rights acquired" pursuant to 25 U.S.C.A. § 470 shall be exempt from State taxation. The purchase and construction of the ski resort was financed by a loan under 25 U.S.C.A. § 470. Assuming the Tribe's leasehold rights and its interest in the ski resort facilities are land, or rights acquired in land, a proposition we do not decide, the exemption from State taxation is also to land, or rights acquired in land. The tax involved here applies neither to land nor to rights acquired in land. The tax under the old "compensating or use tax" is on tangible personal property, see § 72-17-3, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2) and under the Emergency School Tax Act on the privilege of engaging in business activities within New Mexico. See § 72-16-4.1, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2); see Edmunds v. Bureau of Revenue, 64 N.M. 454, 330 P.2d 131 (1958). The exemption under 25 U.S.C.A. § 465 does not apply in this case.

We have considered the Tribe's other contentions and cited cases, but find them distinguishable on the facts and under the law above cited.

(b) The Taxation Being Inconsistent with the Treaty.

The Tribe relies upon Articles 9, 10 and 11 of the Treaty when read with Article 1, cited above, for the proposition that the Treaty imposed a duty on the United States Government to pass legislation and do other acts to insure the permanent prosperity and happiness of the Tribe and that the United States Government is duly bound by this Treaty to make donations, gifts and implements to the Tribe. The Tribe contends that it would be inconsistent with those purposes for the State of New Mexico to be allowed to disrupt the scheme of the Federal Government by permitting an imposition of New Mexico taxes on the Tribe.

We fail to see the merit of the argument. In reviewing the other Articles of the Treaty, the apparent purpose of the Treaty was to insure the Tribe of certain lands and of certain freedoms on tribal lands but it did not include freedom from a situation as disclosed by the facts of this case.

We do not pass judgment on the contention of the Tribe that the Federal Government is interested in the financial success of the Tribe's operation of a ski resort; however, we fail to see, in light of the foregoing Treaty and Enabling Act provisions, how the Federal Government intended to exempt the Tribe from taxation for activities and operations occurring

off Indian lands. The Enabling Act itself denies this contention.

(c) Interference with Tribe's Right of Self-Government.

We agree with the Tribe's contention that if the imposition of a State tax on the Tribe interferes with the Tribe's right to reservation self-government the tax must fail. Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (Ct. App. 1969). The Tribe claims such interference in this case even though the taxes involved arose from and because of operations conducted by the Tribe on non-Indian land. The claim is based on the fact that revenue derived from the ski resort operation is used for the welfare of the Tribe and the resort provides job training for members of the Tribe. These facts show no interference with reservation self-government. The Tribe contends, however, that it *might* interfere because the power to tax is the power to destroy and: "The purpose for which the appellant entered into the ski resort operation is being frustrated and possibly could even be totally defeated if New Mexico is allowed to tax the operation." There are no facts showing a present frustrated purpose; the remainder of the argument is no more than speculation. There being no factual basis for the claim, it is rejected. Compare Village of Kake v. Egan, 369 U.S. 60, 80 S. Ct. 562, 7 L.Ed.2d 573 (1962); McClanahan v. State Tax Commission, 414 Ariz. App. 452, 484 P.2d 221 (1971).

## 2. AUTHORITY TO TAX THE TRIBE WHICH THE STATE HAS NOT ATTEMPTED TO TAX.

It is the Tribe's contention here that since it is not specifically named in § 72-17-2(e), N.M.S.A. 1953 (Repl. Vol. 1961) of the Compensating Tax Act, and § 72-16-2(A), N.M.S.A. 1953 (Repl. Vol. 1961) of the Emergency School Tax Act (both repealed July 1, 1967, and both taxes were for periods of time prior to the repeal), that they are excluded on the basis that general acts do not apply to State statutory authority to tax the Tribe. See Chouteau v. Commissioner of Internal Revenue, 38 F.2d 976 (1930); compare Southern Union Gas Company v. New Mexico Public Service Commission, 82 N.M. 405, 482 P.2d 913 (1971).

No claim is made that the Tribe does not come within the definition of "person" in §§ 72-17-2(e) and 72-16-2(A), supra. The claim is simply that to be taxable, the Tribe must have been specifically named. We disagree. Whatever may be the current validity of the concept that Indians could not be taxed unless specifically named, the Enabling Act specifically permitted the taxation "as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian. . . ." With this specific federal legislative permission, we see no basis in reason, in New Mexico, for the concept that Indians must be specifically named to be included within a statute of general application. The Enabling Act states that Indian property, in the situation in this case, is to be taxed as other property is taxed.

3. TRIBE EXEMPT FROM TAXATION BECAUSE IT IS A FEDERAL INSTRUMENTALITY.

It is the Tribe's contention here that even assuming New Mexico does have authority to tax the Tribe, and assuming further that the Tribe comes within the definition of "person" in the taxing statutes, the Tribe is exempt because it is a federal instrumentality.

The Tribe cites the *Handbook on Federal Indian Law*, U.S. Printing Office (1958) at page 853, for the proposition that insofar as the instrumentality doctrine is concerned, it relates to Indians, their property and their affairs. We do not agree with the Tribe on this general proposition. The Tribe's argument is based on the fact that it is a Tribe and its ski resort operation is financed and supervised by the Federal Government. These facts, in our opinion, are insufficient to support a conclusion that the ski resort is virtually an arm of the United States Government, see dissenting opinion of Justice Marshall in Agricultural Nat. Bank v. Tax Commission, 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1963), and cases cited therein; certainly the ski resort is not essential in the performance of governmental functions, but even if the ski resort could be considered a federal instrumentality, the immunity of the resort from taxation is removed by the provisions of our Enabling Act pro-

vously discussed in this opinion.

Affirmed.

IT IS SO ORDERED.

/s/ William R. Hendley
JUDGE

I CONCUR:

/s/ Joe W. Wood C.J.

Louis R. Sutin, J. (specially concurring)

SUTIN, Judge (Specially concurring)

I specially concur only because the Mescalero Apache Tribe or Sierra Blanca Ski Enterprises, I.D. No. 14-703019-00, which owns the ski resort, is a federal Indian chartered corporation, pursuant to 25 U.S.C.A., §§ 477 and 470.

The fact of being a chartered corporation does not appear in the stipulation. Nevertheless, it states:

* * * *

> 7. The purchase and construction of the ski resort was financed completely by a loan to the Tribe by the federal government under 25 U.S.C.A., Section 470.

25 U.S.C.A., § 470 provides that the Secretary of the Interior "... may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, ..."

25 U.S.C.A., § 477 provides that the Secretary of the Interior may issue a charter of incorporation to a tribe. It further provides:

> Such charter may convey to the *incorporated tribe* the power to purchase ..., or otherwise own, hold, manage, operate, and dispose of property of *every* description, real and personal, ... *and such further powers as may be incidental to the conduct of corporate business*, not inconsistent with law, .... Any charter so issued shall not be revoked or sur-

[illegible] except by Act of Congress. [Emphasis added.]

Article XI, Section 1(a) of the Tribe's Revised Constitution is a part of the stipulation. It provides that the Mescalero Apache Tribal Council has the duty and power to transfer tribal property and other assets to tribal corporations.

The Mescalero Apache Tribe states in its reply brief:

> The issue of a federally chartered corporation under Section 477 is not present in this case.

To me, this constitutes an admission that the Tribe, or Sierra Blanca Ski Enterprises is an Indian chartered corporation. This corporation should be taxed.

The Notice of Assessment of Taxes by the Commissioner was made to Sierra Blanca Ski Enterprises, not to the Tribe. The title of the Protest of Assessment filed by the Tribe refers to Sierra Blanca Ski Enterprises. The Tribe stated it was the "owner and operator of Sierra Blanca Ski Enterprises." In the title to the stipulation of the facts and the decision and order of the Commissioner, it is described as "Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, I.D. No. 14-703019-00." The Tribe was taxed in this name because probably it led the Commissioner to believe it was not a chartered corporation.

If the assumptions of corporate life in this specially concurring opinion are wrong, and called to the attention of this court on motion for rehearing, I will dissent. I do not agree that an Indian Tribe is

subject to payment of the state compensating tax a school tax assessments.

This appears to be the first state tax case against an Indian chartered corporation or tribe. Let us take a look at the history of corporate Indian tribes.

Cohen's Handbook of Federal Indian Law, p.27, states:

> In the narrow sense in which the term is frequently used, a corporation is something chartered by a government, and in this sense only those Indian tribes which have been chartered by some government, e.g., the Pueblos of New Mexico incorporated by territorial legislation, and the tribes incorporated under section 17 of the Act of June 18, 1934, [25 U.S.C.A., § 477] are to be considered corporations.

See United States v. Lucero, 1 N.M. 422, 438 (1869).

In Cohen's, supra, p. 278, 279, the author says:

> Thus it has been administratively determined that the Pueblos of New Mexico are entitled to receive grazing privileges under the Taylor Grazing Act, under the clause in section 3 of that act conferring such rights upon "corporations authorized to conduct business under the laws of the State." The principle involved would appear to be equally applicable to any Indian tribe which has a recognized corporate status, either under the Act of June 18, 1934, or otherwise.

See also Cohen's, supra, p.399, wherein it is said:

> The corporate status of the Pueblos has been recognized in many cases.

The corporate status of Pueblo Indian communities, created in 1847, is still alive in New Mexico. Section 51-17-1, N.M.S.A. 1953 (Repl. Vol. 8, pt. 1). This section gave the Indian Pueblos the status of bodies politic and corporate, and, as such, empowered them to sue in respect of their lands. Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 63 L.Ed. 504, 39 S.Ct. 185 (1918); Garcia v. United States, F.2d 873 (10th Cir. 1956).

In 1904, the Supreme Court of New Mexico held taxable the lands of the Pueblo Indians in New Mexico. Territory v. Delinquent Taxpayers, 12 N.M. 136, 76 P. 307 (1904).

The Tribe claims 25 U.S.C.A., § 465 is a restraint on state's activities. This section applies to title to lands taken in the name of the United States in trust for the Indian tribe or individual Indian. Such lands are exempt from state and local taxation. Chartered Indian corporations are not covered by this section. But see, Martinez v. Southern Ute Tribe, 150 Colo. 524, 374 P.2d 691 (1962).

Under the state taxing acts, a "person" includes a corporation. They do not exclude Indian chartered corporations. Neither is the Indian chartered corporation exempt from payment of taxes. If it were intended to be an instrumentality of the United States, it would have been so stated in 25 U.S.C.A., § 477.

It might be noted that § 72-13-79, N.M.S.A. 19[illegible] (Repl. Vol. 10, pt. 2, Supp. 1969), of the Tax Administration Act, adopted in 1965, provides:

> Liens will attach or levy may be made by terms of any provision of the Tax Administration Act . . . to or on property belonging to the United States of America or to an Indian tribe, an Indian pueblo or any Indian only to the extent allowed by law.

Here again, the Indian chartered corporation is omitted.

Some states "have been given jurisdiction by federal statute over the reservations within their borders. The tribes within these states no longer exercise governmental functions independent of the state. Morever, Congress has authorized all states to extend jurisdiction over tribes within their borders by official act" with tribal consent. 25 U.S.C.A., §§ 1321-22 (Supp. 1970); 82 Harvard Law Review 1343. New Mexico has not moved toward assumption of jurisdiction.

The Mescalero Apache Tribe has left the confines of its reservation. It has donned the robes of a corporation to join its competitors in business. It stands high in its tradition as a separate "nation." It now stands strong in its business and cultural development. As it earns money from citizens of this country it should carry the same burdens of taxation as its competitors. It may even continue in additional ventures in business in every phase of corporate life. New Mexico should welcome this adventure as no

s it has welcomed others to come in the last 123 ns.

In my opinion, an Indian chartered corporation erating on non-Indian land is subject to the com- nsating tax and school tax of this state.

For these reasons, I specially concur.

/s/ Lewis Sutin
JUDGE

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Filed August 6, 1971

[Title omitted in Printing]

Order of Court

This cause having heretofore been argued, s
mitted and taken under advisement and the Co
being now sufficiently advised in the premises,
nounces its decision by Judge William R. Hend
Chief Judge Joe W. Wood and Judge Lewis R. Sa
(specially concurring) affirming the judgment
the Bureau of Revenue for the reasons given in t
opinion of the Court on file.

NOW, THEREFORE, IT IS CONSIDERE
ORDERED AND ADJUDGED by the Court that t
judgment of the Bureau of Revenue whence th
cause came into this Court, be and the same is here
affirmed and the cause is remanded to the said Co
missioner of the Bureau of Revenue for such furth
proceedings as may be proper, if any, consistent a
in conformity with said opinion.

# IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

[Title omitted in Printing]

Filed August 26, 1971

## MOTION FOR RE-HEARING

COMES NOW the Appellant, the MESCALERO APACHE TRIBE, respectfully moves the Court to withdraw its Opinion entered in the instant case and filed on August 6, 1971, and re-hear this matter, and as grounds therefor, would show that the Court erroneously applied certain decisions and statutes to the following points:

I. The State of New Mexico has no authority to tax the Mescalero Apache Tribe.

II. The Tribe does not come within the definition of "person" of the New Mexico statutes and is not named in in the taxing statutes of New Mexico.

III. The Tribe is exempt from taxation because it is a federal instrumentality.

IV. The Tribe is a federally chartered Indian Tribe under 25 U.S.C.A. 476.

As further grounds for re-hearing, the Appellant would respectively refer the Court to the accompanying Brief.

[Signatures and Brief omitted in printing]

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

[Title omitted in Printing]

Tuesday, September 7, 1971

ORDER DENYING REHEARING

This cause coming on for hearing upon Appellant's motion for a rehearing, and the Court having considered said motion and briefs of counsel, and being now sufficiently advised in the premises,

IT IS ORDERED that said motion for rehearing be and the same is hereby denied.

# IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

[Title omitted in printing]

## APPLICATION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Filed September 24, 1971

The Mescalero Apache Tribe, Petitioner herein, respectfully petitions the Supreme Court to review the opinion of the Court of Appeals, by Writ of Certiorari. A copy of said opinion is attached to this Application. As grounds for a Writ of Certiorari the Petitioner would show the Court, that:

1. The date of the decision of the Court of Appeals was August 6, 1971. A timely Motion for Rehearing was filed and an Order denying the Motion for Rehearing was entered September 7, 1971. Final action by the Court of Appeals was on September 7, 1971.

2. The question presented for review is:

May the Bureau of Revenue of the State of New Mexico tax the Mescalero Apache Tribe, an Indian Tribe, in the Tribe's operation of Sierra Blanca Ski Enterprises?

3. The facts material to the question presented are as follows:

The Mescalero Apache Tribe is an Indian Tribe which has a treaty with the United States of America, as evidenced by The Treaty of July 1, 1852, 10 STAT. 979. Pursuant to 25 U.S.C.A. Section 476, the

Mescalero Apache Tribe in 1934 adopted a consti-
tion and is a functioning, viable Indian Tribe und
the control and authority of the United States o
America.

Sierra Blanca Ski Enterprises is a ski resort lo-
cated in Otero and Lincoln Counties, New Mexico, an
is exclusively owned and operated by the Petitioner.
The ski resort is on land belonging to the U. S. Fore
Service which had been leased to the Petitioner for a
period of thirty (30) years. The basic purpose of the
ski resort is to provide revenue to the Petitioner in
lieu of raising revenue through the taxation of tribal
members or in some other manner. The revenue from
the ski resort is utilized for the education, social and
economic welfare of the Mescalero Apache people. The
ski resort also provides a job training center for the
Mescalero Apache people.

The purchase and construction of the ski resort
was financed completely by a loan to the Petitioner
from the federal government under 25 U.S.C.A., Sec-
tion 470.

The Bureau conducted an audit in May of 196
which resulted in Assessment No. 96224 being issued
against the Petitioner for compensating tax in the
amount of $5,887.19, plus interest of $893.82 and pe-
nalties of $588.73. The assessment can be broken down
for the following periods: For September 1, 1963, to
December 31, 1965, principal - $4,925.01; penalty -
$492.50; interest $232.89. For January 1, 1966, to April
30, 1968, principal - $962.18; penalty - $96.23; interest
$660.92. The assessment can also be broken down as

follows: For September 1, 1963, to August 31, 1965, principal - $776.74; penalty - $77.67; interest - $167.97. For September 1, 1965, to April 30, 1968, principal - $5,110.45; penalty - $511.05; interest - $725.85. The compensating tax assessed was a result of the compensating tax being applied against the purchase price of materials which were used to construct two ski lifts at the ski resort. At the time the audit was conducted and the assessment issued, the ski lifts had been completed and were permanently attached to the realty.

All the materials against which the compensating tax was assessed were purchased with money borrowed by the Petitioner from the federal government pursuant to 25 U.S.C.A. Section 470, and the purchase of all such materials were subject to and were approved by the Bureau of Indian Affairs of the federal government.

4. The basis for granting the Writ is that:

(a) The decision of the Court of Appeals holding that the Petitioner was subject to the assessment and payment of taxes on its operations at Sierra Blanca is in conflict with the following provisions of the United States Constitution, the New Mexico Constitution and Federal Statutes:

(1) The Treaty of July 1, 1852, 10 STAT. 979.

(2) 25 U.S.C.A. Section 465.

(3) 25 U.S.C.A. Section 470.

(4) 25 U.S.C.A. Section 476.

(5) The United States Constitution Article I, Section 8.

(6) The United States Constitution Amendment V.

(7) The United States Constitution Amendment XIV, Section 1.

(8) The New Mexico Constitution Article XXI, Section 2.

(9) The New Mexico Constitution Article II, Section 18.

(10) The Enabling Act for New Mexico, June 20, 1910, 36 Statutes at Large, 557, Ch. 310.

(b) The decision of the Court of Appeals holding that the Petitioner is not an instrumentality of the federal government is in conflict with the following authorities:

(1) United States v. Rickert, 188 U.S. 432 (1903).

(2) United States v. Thurston County, 143 Fed. 287 (1906).

(3) Choteau v. Burnet, 283 U.S. 691 (1931).

(4) Clallum County v. United States, 263 U.S. 341 (1923).

(5) McCulloch v. Maryland, 4 Wheat. 316 (1819).

(6) The United States Constitution, Article I, Section 8.

(c) The decision of the Court of Appeals is in conflict with the case of *Ghahate v. Bureau of Revenue*, 80 N.M. 98, 451 P.2d 1002 (Ct. App., 1969), in that the decision denies that the tax interferes with an

Indian Tribe's right to self government. This denial of the Petitioner's right to self government by the decision of the Court of Appeals is in conflict with the following additional authorities:

(1) Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832);

(2) Williams v. Lee, 385 U.S. 217 (1959).

(3) Warren Trading Post v. Tax Commissioner, 380 U.S. 685 (1965).

(4) 25 U.S.C.A. Section 465.

(5) 25 U.S.C.A. Section 470.

(6) 25 U.S.C.A. Section 476.

(7) Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968).

(8) McCulloch v. Maryland, 4 Wheat. 316 (1819).

(9) United States v. Rickert, 188 U.S. 432 (1903).

(d) The decision of the Court of Appeals is in conflict with *Your Food Stores, Inc., v. Village of Espanola*, 68 N.M. 327. 361 P.2d 950 (1961), in that the decision of the Court of Appeals denies the exclusive jurisdiction over the Petitioner as vested in the United States Government, further authorities are as follows:

(1) The Treaty of July 1, 1852, 10 STAT. 979.

(2) The New Mexico Constitution Article XXI, Section 2.

(3) The United States Constitution, Article I, Section 8.

(e) The decision of the Court of Appeals holds that the Petitioner is "a person" as defined in the applicable tax statutes. This is in conflict with *Southern Union Gas v. New Mexico Public Service Commission*, ... N.M. ..., 482 P.2d 913 (1971) and The Enabling Act for New Mexico, June 20, 1910, 36 Statutes at Large, 557, Ch. 310.

(f) The question presented for review involves a significant question of law, in particular the interpretation of the following constitutional provisions as they apply to the Petitioner:

(1) The United States Constitution Article I, Section 8.

(2) The United States Constitution Amendment 5.

(3) The United States Constitution Amendment 14, Section 1.

(4) The New Mexico Constitution Article XXI, Section 2.

(5) The New Mexico Constitution Article II, Section 18.

(g) The issue is of substantial public interest because this is a case of first impression in New Mexico involving the efforts of the State to tax an Indian Tribe, and its impact will have a direct effect upon the Petitioner, other Indian Tribes, the Federal Government and the taxing procedures of the State of New Mexico.

5. The question presented for review was presented to the Court of Appeals in Points I, II and III

of the Petitioner's (Appellant's) Brief in Chief and in Points I, II, III and IV of Petitioner's (Appellant's) brief accompanying the Motion For Rehearing.

[Signatures omitted in printing]

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Friday, October 8, 1971

[Title omitted in printing]

FINAL ORDER

This cause having heretofore been submitted and taken under advisement and an opinion of the Court having been handed down on the 6th day of August, 1971, motion for rehearing having been denied on on September 7, 1971, petition for writ of certiorari having been denied on October 6, 1971;

IT IS, THEREFORE, ORDERED That the Order of this Court entered herein on the 6th day of August, 1971, affirming the judgment of the Bureau of Revenue, be and the same is hereby made final.